United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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74-2594

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

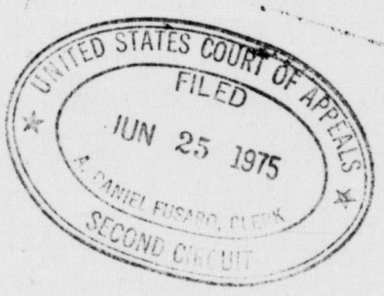
JACQUELINE DOZIER,

Appellant.

Docket No. 74-2594

PETITION FOR REHEARING
WITH SUGGESTION
FOR REHEARING EN BANC

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
JACQUELINE DOZIER
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

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I

Appellant Jacqueline Dozier seeks rehearing with a suggestion for rehearing en banc, from a judgment of this Court (Friendly, Feinberg C.J.and Lasker,*D.J)entered June 10, 1975, affirming a judgment of the United States District Court for the Eastern District (Judd, D. J.) entered December 6, 1974, convicting appellant of aiding and abetting the possession of cocaine with intent to distribute. One of the issues

* Sitting on the Court of Appeals by designation.

raised on appeal was the validity of the jury instruction on "conscious avoidance of knowledge." On May 21, 1975, after both the filing of the briefs and oral argument in this case another panel of this Court (Moore, Mansfield and Gurfein,C. J.) in United States v. Bright, (Doc. No. 74-2447, Slip op. 3625(2d Cir. May 21, 1975)) reversed a conviction holding that in order to be sufficient the conscious avoidance of knowledge charge must be juxtaposed with the caveat that if the defendant actually believed in facts which were different from those essential for conviction (i.e., as in Bright, the belief that the bills were not stolen) he must be acquitted. The affirmance of this case on the conscious avoidance of knowledge charge as given here is in direct conflict with Bright.

As in Bright, the trial judge in this case failed to balance the conscious avoidance charge. Both in his main jury instruction and also in the supplemental instruction given in response to the jury's inquiry the judge merely directed that appellant could not "close her eyes to facts which should have prompted her to investigate." Specifically he directed in the main charge:

> I refer to the word knowingly, knowledge can be proved by a defendant's conduct and by all facts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing

> his eyes to facts which should prompt him to investigate; and so, knowledge can be established by direct or circumstantial evidence just as any other facts in the case, . . . If you find from all the evidence beyond a reasonable doubt either that the defendant knew that she was helping in a cocaine transaction, or that she had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes of the facts, you could find sufficient evidence to find her guilty beyond a reasonable doubt.
>
> (Trial Transcript, September 24, 1974 9-10.)

When during the deliberations the jury returned to ask whether appellant's general awareness of "some" illegality would suffice to convict despite actual ignorance that the illegal transaction involved cocaine,* the judge instructed:

> . . . I would say it does make a difference to the extent there are different penalties for different crimes, so I don't think aiding and abetting in something less than drugs could justify a conviction here, but cocaine and heroin are in the same category. If she believed it was drugs but wasn't sure what kind, that wouldn't affect her guilt of aiding and abetting; and what I said about knowledge should be considered. Knowledge may be proved by a defendant's conduct and by all of the facts and circumstances surrounding the case. No person can intentionally oppose knowledge by closing her eyes to facts that would prompt her to investigate. So in order

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* The jury note specifically inquired: "If the defendant went to the theater thinking there was an illegal transaction but had no idea it was cocaine, does this make a difference?" (Trial Transcript, Spetember 24, 1974, at 19.)

> to convict you have to find . . . she must have either known that either there was a narcotic drug involved or had knowledge of sufficient facts that she was just trying to prevent herself from having knowledge, deliberately closing her eyes. I hope that will help you decide it . . .
>
> (Trial Transcript, September 24, 1974 at 20-21.)

Nowhere were the jurors told, as is required, that if the appellant actually believed that the illegal transaction did not involve a narcotic substance (for example, that she either believed that the package contained stolen checks or, forged instruments, or marijuana, etc.) they had to acquit.

The facts mandating reversal in this case are even more compelling than they wre in Bright. In Bright where the issue was the defendant's knowledge of the stolen character of the checks, the defendant had physical possession of the stolen checks and the possession occurred after an earlier check from the same source had been returned unpaid by her bank.

In contrast, in the instant case, appellant neither possessed nor even saw the package containing the cocaine. Further, she testified at trial that she did not know that Mary Lou Dantzler her co-defendant, had negotiated with the agents to sell cocaine. Additionally, the jury's note reveals not merely a need for clarification, as it did

in Bright, but also the inclination to accept as true that appellant was not aware that the package contained cocaine. In this context the failure of the trial judge to temper the conscious avoidance of knowledge instruction with the caution that the jury could not convict if the defendant actually believed the package contained something else, is error mandating reversal.

II

Appellant also requests rehearing on the grounds set forth in Point I of her main brief on appeal.

CONCLUSION

For the aforesaid reasons, the petition for rehearing with a suggestion for rehearing en banc should be granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG

Of Counsel

Certificate of Service

June 24, 1975

I certify that a copy of this notice of motion and affidavit has been mailed to the United States Attorney for the Eastern District of New York.

Sheila Gordon